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# The Harmonisation Potential of the Charter of Fundamental Rights of the European Union

Filippo Fontanelli\* and Amedeo Arena\*\*

## Abstract

*This article discusses two underrated and connected aspects that determine the applicability of the EU Charter on Fundamental Rights to Member State measures. First, the Charter can be a decisive standard of review for domestic measures only when they are covered by EU law but are not precluded by it. In this respect, the distinction between non-preclusion and non-application of EU law has been overlooked by legal scholarship. Second, because the scope of application of EU law and that of the Charter are identical, the latter suffers from the same uncertainties as the former. This article concludes that the entry into force of the Charter has exposed the blurred contours of the application of EU law, in particular in the area of the market freedoms. As a result, a certain spontaneous harmonisation of human rights protection has emerged.*

## Keywords

Market freedoms; spontaneous harmonisation; Charter of Fundamental Rights of the EU; Court of Justice; application of EU law; Article 51 of the Charter; jurisdiction of the Court of Justice

## A Introduction

The Charter of Fundamental Rights of the European Union (the Charter) binds EU institutions and Member States when they are implementing EU law.<sup>1</sup> Thus, it does not apply to State measures *outside the scope* of application of EU law, including those *beyond the reach* of the EU rules on free movement. The Twitter version of this article, therefore, would read: “*the Charter neither restricts nor enlarges the application to domestic measures of EU law rules, including the rules on the market freedoms.*” There is, in other words, no direct harmonisation effect in the application of the Charter.

Nevertheless, it is worth observing how this symbiotic relation between the Charter and EU law – the *Fransson*-equivalence, as it were<sup>2</sup> – works out in practice. Notably, when the scope of application of EU law has imprecise boundaries, so has the Charter, and this happens frequently when the EU law at stake is the law of the common market and of EU citizenship. Whereas the uncertainty mostly resolves itself (domestic measures are either prohibited by EU

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<sup>1</sup> Article 51(1) of the Charter. *See also* Cs. I. Nagy, ‘Est-ce que l’Union européenne devrait avoir le pouvoir de forcer les états membres à respecter les droits de l’homme ? Une analyse prospective relative à l’application de la charte des droits fondamentaux aux états membres’, *Revue de Droit International et de Droit Comparé*, Vol. 94, No. 3, 2017, pp. 510.

<sup>2</sup> The *Fransson* equivalence dictates that the scope of application of EU law and the Charter to State measures is the same, *ratione materiae*. Whereas (then) President Skouris praised the *Fransson*-equivalence, it arguably creates more problems than it solves. *See, respectively*, V. Skouris, ‘Développements Récents de la Protection des Droits Fondamentaux dans l’Union Européenne: Les Arrêts Melloni et Åkerberg Fransson’, *Il Diritto dell’Unione Europea*, 2013, No. 2, 229-243 and F. Fontanelli, ‘Implementation of European Union Law by Member States under Article 51 (1) of the Charter of Fundamental Rights’, *Columbia Journal of European Law*, Vol. 20, 2013, pp. 193-247.

law or are not, regardless of whether they are allowed or just not contemplated), in certain cases it has consequential effects: these are the cases of non-preclusion.

One of the central points of this article is the underrated importance of non-precluded measures. More precisely, it is argued that State measures that are not precluded by EU law are the springboard of the Charter's indirect harmonisation effects. It is important to delineate the category of non-precluded measures accurately, before expanding on its implications.<sup>3</sup> To assess the impact of the Charter, it is indispensable to observe the application of EU law to domestic measures at large, as the application of the Charter and the application of EU law go hand in hand. This alignment carries within a simplification (the Charter's application overlaps with the application of EU law) and a complication (the scope of application of EU law is uncertain).

The question of State acts' compliance with EU law is normally fashioned as a binary determination. Either a State act breaches EU law, and is therefore unlawful, or it does not, and is therefore lawful. For instance, Article 34 TFEU prohibits national measures which restrict the imports of goods from other Member States. These measures are therefore unlawful: domestic courts are required to put them aside.<sup>4</sup> Conversely, Article 34 TFEU does not preclude quantitative restrictions on imports justified on grounds of public security,<sup>5</sup> nor does it prohibit measures that do not entail a quantitative restriction. These measures are therefore lawful, as a matter of EU law, and will apply.

However, the dichotomy is somewhat simplistic because it obfuscates a further distinction. A prohibition of door-step-selling of jewellery, which does not restrict cross-border trade in goods, is simply *not covered* by Article 34 TFEU.<sup>6</sup> On the contrary, a ban on equipment increasing the power of mopeds which seeks to protect human health is covered, but *not precluded*, by Article 34 TFEU insofar as it can be justified under Article 36 TFEU.<sup>7</sup> The former measure lies outside the scope of EU law altogether, whilst the latter falls within the scope of EU law, but does not breach it. The two categories of non-covered and non-precluded measure must be examined separately.

This article observes, in succession, the received knowledge regarding State measures that fall outside the scope of EU law and State measures that fall under EU law, but are not precluded by it. It then maps the blurred division between such categories, to identify the problems that, in turn, affect the reach of EU law and the Charter at once. One of the striking effects of this theoretical blur is that, ultimately, State authorities might choose to follow the Charter just out of precaution, accelerating its unintended harmonisation effects.

Our main conclusion is that this theoretical uncertainty is regrettable, and that one of the unintended effects of the Charter's growing application is that the CJEU (the Court) has gradually come under an enormous pressure to address the long-ignored problem of the precise application of EU law to domestic measures.

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<sup>3</sup> The importance of non-precluded measures under the Charter is discussed in F Fontanelli, 'Implementation of EU Law through Domestic Measures after Fransson: the Court of Justice Buys Time and 'Non-preclusion' Troubles Loom Large', *European Law Review*, Vol. 39, No. 5, 2014, pp. 682-700.

<sup>4</sup> Article 34 TFEU.

<sup>5</sup> Article 36 TFEU.

<sup>6</sup> Case C-441/04, *A-Punkt Schmuckhandels GmbH v Claudia Schmidt*, EU:C:2006:141, para 30.

<sup>7</sup> Case C-142/09, *Criminal proceedings against Vincent Willy Lahousse and Lavichy BVBA*, EU:C:2010:694, paras 43-48.

## B Non-covered measures and the application of EU law

Non-covered measures are those measures that do not breach EU law because they do not fall under its reach in the first place. Their identification implicates knowing the contours of the application of EU law. However, whether EU law applies to a specific State measure is a question that often cannot be answered with certainty.<sup>8</sup>

The scope of application of EU law is certainly related to the reach of EU competences. However, whether the EU has competence over certain matters is a poor predictor of whether a certain matter falls under the scope of EU law. First, the exact boundaries of the competences listed in Articles 3-6 TFEU are difficult to draw *in abstracto*.<sup>9</sup> The “internal market”, for instance, is more of a goal than a specific subject-matter. Second, a measure may fall in an area where the EU has a non-exclusive competence, but it has not yet enacted EU legislation in that matter or the relevant EU acts are no longer in force.<sup>10</sup> In such scenario, unless the national measure is in breach of obligations laid down in the Treaties, the *existence* of EU competences does not warrant the inference that the measure falls within the scope of EU law.<sup>11</sup> Third, and conversely, the *absence* of EU competences in the area regulated by the national measure is no guarantee that such a measure lies beyond the reach of EU law. While, in principle, Member States are free to legislate in areas where the Treaties have not conferred competences upon the Union, they still cannot exercise those competences in a manner inconsistent with EU law.<sup>12</sup>

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<sup>8</sup> See C-203/15, *Tele2 Sverige*, EU:C:2016:970. The judgment grapples with the apparent contradiction between Article 1(3) and Article 15(1) of the e-privacy Directive 2002/58. Whereas the first provision seems to exclude public security measures from the Directive’s application, the latter seems to authorise them. In other words, it is not clear whether certain national measures are not-covered or not-precluded by the Directive. The Court opted for the latter view, see para 75-79. See also the General Opinion of Advocate General Saugmandsgaard Øe EU:C:2016:572, para 92-97.

<sup>9</sup> For instance, legal commentators have highlighted the difficulty in determining the exact boundaries of the EU exclusive competence in the area of the “establish[ment] of the competition rules necessary for the functioning of the internal market” as per Article 3(1)(b) TFEU. See, for instance, A. Dashwood, ‘The relationship between the Member States and the European Union/European Community’, *Common Market Law Review*, Vol. 41, No. 2, 2004, p. 371 (Arguing that such definition is inaccurate.); R Mastroianni, ‘Le competenze dell’Unione’, *Il Diritto dell’Unione Europea*, 2005, p. 398 (Noting that the above definition adopts the pre-Lisbon teleological approach to the vertical division of powers.); R Schütze, ‘Lisbon and the Federal Order of Competences: a Prospective Analysis’, *European Law Review*, Vol. 33, 2008, p. 717 (Arguing that the drafters have fallen victim to an “ontological fallacy” insofar as the category of “rules necessary for the functioning of the internal market” does “not, by definition, require the exclusion of all national action within their scope”).

<sup>10</sup> In *Tele2 Sverige*, for instance, at stake was the regulatory gap left by the annulment of the Data Retention Directive, and whether its implementing regulations could fall under Article 15(1) of the e-privacy Directive 2002/58.

<sup>11</sup> See Case C-198/13, *Víctor Manuel Julian Hernández and Others v Reino de España (Subdelegación del Gobierno de España en Alicante) and Other*, EU:C:2014:2055, para 36 (“[T]he mere fact that a national measure comes within an area in which the European Union has powers cannot bring it within the scope of EU law”). See also Joined Cases C-483/09 and C-1/10, *Gueye and Salmerón Sánchez*, EU:C:2011:583, paras 55, 69 & 70 and Case C-370/12, *Pringle*, EU:C:2012:756, paras 104-105 & 180-181.

<sup>12</sup> See Case C-348/96, *Criminal proceedings against Donatella Calfa*, EU:C:1999:6, para 17 (“Although in principle criminal legislation is a matter for which the Member States are responsible, the Court has consistently held that Community law sets certain limits to their power, and such legislation may not restrict the fundamental freedoms guaranteed by Community law.”). See also Case 186/87, *Ian William Cowan v Trésor public*, EU:C:1989:47, para 19; Case 203/80, *Criminal proceedings against Guerrino Casati*, EU:C:1981:261, para 27. More recently, in a case relating to the right to residence of EU citizens and third country citizens, see the reasoning of the Court in Case C-165/14, *Alfredo Rendón Marín*, ECLI:EU:C:2016:675, para 75: “although [these situations] are governed by legislation which falls, a priori, within the competence of the Member States, namely legislation on the right of entry and residence of third-country nationals outside the scope of provisions of secondary legislation which provide for the grant of such a right under certain conditions, they nonetheless have an intrinsic

The latter scenario arises regularly in the operation of the market freedoms. Whereas EU legislation promotes positive integration of the common market through the approximation of domestic laws, the market freedoms as protected in the Treaties reflect a model of negative integration. Under the Treaty provisions on the four freedoms, States are not asked to adopt specific conduct, but are enjoined from raising trade obstacles, irrespective of what matter they might be regulating. The principle of conferral, which delineates the outer limits of EU competence, thus cannot constrain the reach of the EU market freedoms *ratione materiae*.

To determine whether a certain domestic measure falls under the TFEU free movement provisions, the Court established, among others, a test that does not rely on the attribution of competences but on the factual matrix of the situation at hand.<sup>13</sup> This is the “purely internal situations” test. It relates to the practical coordinates of the case (the conduct, the nationality of the persons affected, the location of the interests involved). It is not a sophisticated legal test but it is founded on a plausible assumption: when a factual scenario has no trans-border element, it can be presumed that EU law does not apply to it.<sup>14</sup> The same remarks apply, in essence, to the exercise of citizenship rights – a field where the “purely internal situation” test has often been the only relatively reliable device to police the interplay between EU and domestic law.

Cases like *Rottman*,<sup>15</sup> *Viking*,<sup>16</sup> *Wittgenstein*<sup>17</sup> and *Pfleger*<sup>18</sup> illustrate very well the grasp of EU market freedoms and citizenship rights over matters where the Treaties did not confer any competence on the EU. These cases arose in the application of rules governing the withdrawal of German citizenship, the UK regime of strike rights, the Austrian rules prohibiting the use of nobility titles and Austrian criminal law punishing the use of unlicensed gambling machines. All these measures have at least one crucial aspect in common: they governed matters that, according to the principle of conferral, should rest with the Member States. Nonetheless, all these measures had an impact on the exercise of a market freedom or an EU citizenship right.

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connection with the freedom of movement and residence of a Union citizen, which prevents the right of entry and residence being refused to those nationals in the Member State of residence of that citizen, in order not to interfere with that freedom.”

<sup>13</sup> That test is firmly grounded in the wording of several TFEU provisions in the area of internal market: Articles 30 and 34 TFEU prohibit custom duties and quantitative restrictions in trade “between Member States”; Article 45(1) TFEU, concerning the free movement of workers, expressly refers to “nationality”; Article 49 TFEU, prohibiting restrictions on establishment “by citizens of a Member States in the territory of another Member State”; Article 56 TFEU, in turn, prohibits restrictions on the freedom to provide services “in respect of national of Member States who are established in a Member State other than that of the person for whom the services are intended”; finally, Article 69 TFEU prohibits restrictions on the movement of capital “between Member States, as well as between Member States and third countries”.

<sup>14</sup> See A Arena, ‘I limiti della competenza pregiudiziale della Corte di giustizia in presenza di situazioni puramente interne: la sentenza Sbarigia’, *Diritto dell’Unione Europea*, Vol. 1, 2011, p. 207 (Noting that the Court’s “traditional” approach to purely internal situations implies that the existence of a cross-border element in the case’s factual matrix entails the presumption that the national measure has an impact on cross-border trade.). See also A Tryfonidou, ‘The Outer Limits of Article 28 EC: Purely Internal Situations and the Development of the Court’s Approach through the Years’, in C Barnard & O Odudu (Eds.), *The Outer Limits of European Union Law*, Oxford and Portland, Hart Publishing, 2009 p. 200 (“Under this approach ... if the goods that are involved in the facts have remained confined within the territory of one and the same Member State, the situation immediately qualifies as purely internal and this signifies the end of the enquiry as to a possible violation of Article 28 EC”).

<sup>15</sup> Case C-135/08, *Janko Rottmann*, EU:C:2010:104.

<sup>16</sup> Case C-438/05, *The International Transport Workers’ Federation and The Finnish Seamen’s Union*, EU:C:2007:772.

<sup>17</sup> Case C-208/09, *Sayn-Wittgenstein*, EU:C:2010:806.

<sup>18</sup> Case C-390/12, *Pfleger and others*, EU:C:2014:281.

As a result, these measures *fell under the scope of EU law* and some of them were ultimately *in breach thereof*. In all these cases the existence of a trans-border element (Mr Rottman's previous Austrian citizenship, the trans-border operation of the Finnish ferry company, Ms Wittgenstein's dealings with a non-Austrian administration, the criminal prosecution of Czech individuals in Austrian courts) was a better predictor of the application of EU law than the principle of conferral. As Advocate General Spuznar put it, "... it is precisely when they are exercising their powers that the Member States must take care to ensure that EU law is not deprived of its effectiveness."<sup>19</sup>

It might be tempting, then, to seek guidance as to the scope of EU law by looking at the boundaries of the jurisdiction of the Court of Justice in the context of the preliminary ruling procedure.<sup>20</sup> Indeed, the Court has repeatedly held that its task is not to give advisory opinions "on general or hypothetical questions"<sup>21</sup> and, in particular, that it may refuse to provide a preliminary ruling if "the interpretation of European Union law sought bears no relation to the actual facts of the main action".<sup>22</sup>

However, that approach is theoretically flawed because, in the context of the preliminary ruling procedure, the Court's task is to rule on the interpretation (or validity) of EU law, not to its applicability in the main proceedings. It is thus no wonder that, according to settled case-law, the Court leaves it to the referring court to determine "both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court."<sup>23</sup>

Moreover, such a "jurisdictional" criterion may yield false positives, i.e. situations where the Court provides a preliminary ruling although the situation at hand lies beyond the scope of EU law. In the context of the internal market, the Court has on several occasions provided preliminary rulings on a provision of EU law that did not apply to the main proceedings, because they concerned purely internal situations. For instance, in *Dzodzi* the Court ruled on the interpretation of EU provisions that were "made applicable" in the main proceedings by way of a reference contained in national provisions. The Court considered that it was "manifestly in the interest of the Community legal order that, in order to forestall future differences of interpretation, every Community provision should be given a uniform interpretation irrespective of the circumstances in which it is to be applied."<sup>24</sup> Likewise, in *Guimont*, the Court provided guidance on Article 34 TFEU even if the main proceedings concerned a purely internal situation, holding that a preliminary ruling can be useful when national law requires that a national producer enjoy the same rights as those enjoyed under EU law by a producer of another Member State in the same situation.<sup>25</sup>

By the same token, the criterion in question may yield false negatives, i.e. situations where the Court declines its jurisdiction to give a preliminary ruling in circumstances falling within the scope of EU law. For instance, the Court may refuse to answer a preliminary question if the referring court fails to define the factual and legislative context of the questions: in *Z.Š. and*

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<sup>19</sup> Opinion in Case C-165/14, *Rendón Marín*, EU:C:2016:75, para 113.

<sup>20</sup> See Case C-281/15, *Sahyouni*, EU:C:2016:343, para 23: "[i]t follows therefrom that neither the provisions of Regulation No 1259/2010, referred to by the referring court, nor those of Regulation No 2201/2003, nor any other legal act of the European Union applies to the dispute in the main proceedings."

<sup>21</sup> Case C-212/04, *Adeneler and others*, EU:C:2006:443, para 42.

<sup>22</sup> Case C-238/05, *Asnef-Equifax and Administración del Estado*, EU:C:2006:734, para 17.

<sup>23</sup> See, for instance, Case C-571/10, *Kamberaj*, EU:C:2012:233, para 40.

<sup>24</sup> Cases C-297/88 and C-197/89, *Dzodzi*, EU:C:1990:36, para 37.

<sup>25</sup> Case C-448/98, *Guimont*, EU:C:2000:663, para 23.

*Others*, the Court ruled that the request for a preliminary ruling on the interpretation of Article 8 of Regulation no. 561/2006 on road transport was inadmissible because the referring court did not specify what paragraph was the subject of its question and how the interpretation sought was necessary to resolve the dispute in the main proceedings.<sup>26</sup>

## C Non-precluded measures

Non-precluded measures are Member State measures which fall under the scope of EU law and are in line with the applicable EU provisions. They can arise under different circumstances, which are not mutually exclusive. A few examples can be mentioned.

At the outset, the internal market fundamental freedoms envisage a number of express and implied derogations. National measures in accordance with those derogations fall within the scope of EU law, but are not precluded by it. Article 52(1) TFEU, for instance, provides that the right of establishment is no bar to national provisions granting special treatment for foreign nationals on grounds of public policy, public security or public health.<sup>27</sup> Moreover, the Court recognised a number of overriding reasons relating to the public interest that can serve as a justification for the introduction of indistinctly applicable restrictions at the national level.<sup>28</sup> Likewise, under Article 15(1) of the e-privacy Directive States can restrict the internet users' rights granted by the Directive to pursue public security goals. By the same token, the Court acknowledged that Member States can take measures to prevent the abuse of the free movement provisions set out in the TFEU.<sup>29</sup>

Furthermore, positive integration provisions laid down in EU legislation may also envisage areas of permissible national action falling within the scope of EU law. EU legislation may require the adoption of certain measures at the national level. Directives are an obvious example, although also certain provisions laid down in regulations may envisage implementation at the national level.<sup>30</sup> In *SGS Belgium*, for instance, the Court ruled that States,

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<sup>26</sup> Case C-325/15, *Z.Š. and Others*, EU:C:2016:107, paras 32-33.

<sup>27</sup> See also the express derogations laid down in Article 36, 45(3), 62, and 65 TFEU.

<sup>28</sup> For a non-exhaustive list, see Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda and others v Commissariaat voor de Media*, EU:C:1991:323, para 14: “the overriding reasons relating to the public interest which the Court has already recognized include professional rules intended to protect recipients of the service (Joined Cases 110/78 and 111/78 *Van Wesemael* [1979] ECR 35, paragraph 28); protection of intellectual property (Case 62/79 *Coditel* [1980] ECR 881); the protection of workers (Case 279/80 *Webb* [1981] ECR 3305, paragraph 19; Joined Cases 62/81 and 63/81 *Seco v EVT* [1982] ECR 223, paragraph 14; Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417, paragraph 18); consumer protection (Case 220/83 *Commission v France* [1986] ECR 3663, paragraph 20; Case 252/83 *Commission v Denmark* [1986] ECR 3713, paragraph 20; Case 205/84 *Commission v Germany* [1986] ECR 3755, paragraph 30; Case 206/84 *Commission v Ireland* [1986] ECR 3817, paragraph 20; *Commission v Italy*, cited above, paragraph 20; and *Commission v Greece*, cited above, paragraph 21), the conservation of the national historic and artistic heritage (*Commission v Italy*, cited above, paragraph 20); turning to account the archaeological, historical and artistic heritage of a country and the widest possible dissemination of knowledge of the artistic and cultural heritage of a country (*Commission v France*, cited above, paragraph 17, and *Commission v Greece*, cited above, paragraph 21).”

<sup>29</sup> See, for instance, Case 33/74, *Johannes Henricus Maria van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, EU:C:1974:131, para 13; Case C-196/04, *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue*, EU:C:2006:544, para 35; Case C-212/97, *Centros Ltd v Erhvervs- og Selskabsstyrelsen*, EU:C:1999:126, para 24.

<sup>30</sup> Case C-403/98, *Azienda Agricola Monte Arcosu Srl v Regione Autonoma della Sardegna*, EU:C:2001:6, para 26 (“[A]lthough [...] the provisions of [...] regulations generally have immediate effect in the national legal systems without its being necessary for the national authorities to adopt measures of application, some of their provisions may none the less necessitate, for their implementation, the adoption of measures of application by the Member States.”).

by setting administrative penalties on the economic operators identified in Regulation No 2988/95 to protect EU's financial interests, were implementing that Regulation.<sup>31</sup>

EU legislation may, within its scope of application, expressly authorise certain categories of national measures.<sup>32</sup> A case in point is that of minimum harmonisation clauses, enabling Member States to enact "stricter or more detailed" requirements, relative to the "floor" set by the EU legislature, as long as they do not exceed the "ceiling" set by EU primary law.<sup>33</sup> Another example is that of EU legislation affording Member States different options: under the old version of the "Dublin" regulation,<sup>34</sup> for instance, Member States could process an asylum request instead of returning the applicant back to the Member State of entry;<sup>35</sup> similarly, under the Audiovisual media services directive, each Member State can decide either to prohibit product placement or to authorise it subject to a number of requirements set out in that directive.<sup>36</sup>

Moreover, EU legislation may harmonise a certain matter only partially, thus enabling Member States to regulate other aspects of the same matter.<sup>37</sup> For instance, in *De Agostini*,<sup>38</sup> the Court ruled that although the Television Without Frontiers directive had harmonized national provisions on television advertising and sponsorship, it had done so "only partially".<sup>39</sup> Accordingly, it could not be regarded as "excluding completely and automatically the application of rules other than those specifically concerning the broadcasting and distribution of programmes",<sup>40</sup> nor as precluding "the application of national rules with the general aim of consumer protection",<sup>41</sup> such as the Swedish ban on misleading advertising that applied also, but not only, to television advertising.<sup>42</sup>

This category of rules probes the blurry line between non-preclusion and non-application: whereas a matter is regulated by EU law, some specific aspects of it are not. In the practice, it might be difficult to argue conclusively that national measures relating to the latter specific

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<sup>31</sup> Case C-367/09, *Belgisch Interventie- en Restitutiebureau v SGS Belgium NV and Others*, EU:C:2010:648, paras 34-35.

<sup>32</sup> See, generally, A Arena, 'Exercise of EU Competences and Pre-emption of Member States' Powers in the Internal and the External Sphere: Towards 'Grand Unification'?', *Yearbook of European Law*, Vol. 35, No. 1, 2016, pp. 28-105.

<sup>33</sup> See, generally, F de Cecco, 'Room to move? Minimum harmonization and fundamental rights', *Common Market Law Review*, Vol. 43, 2006, pp. 9-30.; P Rott, 'Minimum Harmonisation For the completion of the internal market? The example of consumer sales law', *Common Market Law Review*, Vol. 40, 2003, pp. 1107-1130.

<sup>34</sup> Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

<sup>35</sup> Joined Cases C-411/10 and C-493/10, *N.S. and others*, EU:C:2011:865. On the new version of this provision (Article 17(1) of the Dublin III Regulation), see Case C-578/16 PPU, *C. K., H. F., A. S. v Republika Slovenija*, ECLI:EU:C:2017:127, para 54.

<sup>36</sup> Article 11 of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).

<sup>37</sup> See R Schütze, 'From Dual to Cooperative Federalism: the Changing Structure of European Law', Oxford, Oxford University Press, 2009, p. 195: "[w]here European law does not harmonize all aspects within a policy area, Community terminology speaks of partial harmonization."

<sup>38</sup> Joined cases C-34/95, C-35/95, and C-36/95, *Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB* (C-34/95) and *TV-Shop i Sverige AB* (C-35/95 and C-36/95), EU:C:1997:344.

<sup>39</sup> *Ibid.*, para 32.

<sup>40</sup> *Ibid.*, para 33.

<sup>41</sup> *Ibid.*, para 34.

<sup>42</sup> *Ibid.*, para 38.



issues are allowed by EU law, instead of them being irrelevant for EU law. Sometimes, the characterisation is a matter of convention or, worse, convenience. Some cases will be discussed below, to show the ambiguity of this category of rules.

## **D The blurred line between non-preclusion and non-application**

It is now necessary to explain why the difference between non-preclusion and non-application is fundamental. It might be argued that the difference does not really come with a practical consequence: whether a domestic measure is not covered or not prohibited by EU law, it will simply be lawful under EU law. The case-law of the Court of Justice, indeed, has often reflected this nonchalant approach to the issue.

For instance, the blurring is visible in the decisions of the Court regarding non-discriminatory measures regulating the opening hours of shops. In line with the *Keck* doctrine,<sup>43</sup> the Court has regularly found that rules on shops' opening times are selling arrangements (as opposed to product requirements) and therefore do not breach Art. 34 TFEU. In *Turnhout*,<sup>44</sup> a 2014 case, the Court confidently noted that, as observed "on a number of occasions", Articles 34 to 36 TFEU "*do not apply* to national rules concerning the closure of shops" which are indistinctly applicable.<sup>45</sup> To take but one example, consider how the Court addressed the same kind of measures in *B&Q*,<sup>46</sup> a case of 1992:

...the legislation at issue pursued an aim *which was justified* under Community law. National rules restricting the opening of shops on Sundays reflected certain choices relating to particular national or regional socio-cultural characteristics. It was for the Member States to make those choices *in compliance with the requirements of Community law*, in particular the principle of proportionality.<sup>47</sup>

It is clear in this case that the Court, which confirmed the measure's compliance with EU law requirements, hinted at non-preclusion, rather than non-application. However, the conclusion in the same case, which abruptly used the language of non-application, reveals that, in essence, the Court used non-application and non-preclusion interchangeably:

...Article [34 TFEU] is to be interpreted as meaning that the prohibition which it lays down *does not apply* to national legislation prohibiting retailers from opening their premises on Sundays.<sup>48</sup>

Indeed, in these cases the distinction would not come with a practical difference, and the Court's conceptual oscillation is without consequence. However, there is at least one vital distinction which should call for a more rigorous separation between non-precluded and non-covered State measures: general principles of EU law and the Charter only apply to non-precluded measures.<sup>49</sup>

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<sup>43</sup> Joined Cases C-267/91 and C-268/91, *Keck and Mithouard*, EU:C:1993:905.

<sup>44</sup> Case C-483/12, *Pelckmans Turnhout*, ECLI:EU:C:2014:304.

<sup>45</sup> *Ibid.*, para 24, emphasis added.

<sup>46</sup> Case C-169/91, *Council of the City of Stoke-on-Trent and Norwich City Council / B & Q Plc*, EU:C:1992:519.

<sup>47</sup> *Ibid.*, para 11.

<sup>48</sup> *Ibid.*, para 17.

<sup>49</sup> See, for instance, the orders in Case C-328/15, *Târșia*, EU:C:2016:273; Case C-520/15, *Aiudapds*, EU:C:2016:124.

Let's observe *Karner*, another case referring to a selling arrangement (a rule on advertising, prohibiting certain misleading statements made to sell goods bought at judicial auctions) which falls in time roughly halfway (2004) between *B&Q* and *Turnhout*. In this case, the Court took pains "first of all, to determine whether [the domestic measure] falls within the scope of application of Article [34 TFEU]." <sup>50</sup> After recalling the *Keck* doctrine on selling arrangements, the Court noted that the measure was not discriminatory and therefore was "not caught by the prohibition in Article [34 TFEU]". <sup>51</sup> This was, in other words, a measure which fell under EU law but was not precluded (unlike the selling arrangements in *Turnhout*, which escaped EU regulation altogether). The Court, then, proceeded to review the measure's compliance with Art. 10 of the European Convention on Human Rights (freedom to impart information). The domestic measure was indeed considered to constitute an interference, albeit proportionate and justifiable, with the corresponding general principle of EU law.

Like general principles, the Charter applies only to State measures that implement EU law. <sup>52</sup> In other words, a State measure can be reviewed against the Charter only if it falls under the scope of EU law. When a measure does not fall under EU law, the Charter is irrelevant. When a measure is prohibited by EU law, <sup>53</sup> the Charter has no added value in the review of EU-legality: the measure must be disapplied regardless of whether it respects the Charter or not. Consequently, the Charter only matters as a standard of review when it applies to – and prohibits – non-precluded measures. In other words, the added value of the Charter as a binding source is the possibility that it sanction the illegality of State measures that are governed, but not precluded, by EU law. <sup>54</sup>

The *Fransson* case provides a good illustration of the application of the Charter to non-precluded measures. <sup>55</sup> The Swedish measure (providing for the criminal prosecution of tax wrongdoing) was found to implement EU law, because it sought to discourage and punish tax evasion, including VAT evasion, in line with Art. 325 TFEU. Therefore, the Swedish measure fell under the scope of EU law and did not raise issues of compliance with the implemented norms. However, the application of EU law triggered the application of the Charter too. As a result, the Charter could be used as an additional standard of review of the domestic measure. Whereas in that case the Court found no obvious breach of the Charter, <sup>56</sup> it is only a matter of time before a non-precluded measure is declared EU-illegal for breach of the Charter. Two cases can be described, briefly, in which this scenario almost came into being. One deals with market freedoms, the other with the rights of EU citizens. In neither case the Court sanctioned the EU-illegality of a non-precluded norm for a breach of the Charter – this scenario has never materialised so far. Nonetheless, a short discussion of the legal and factual matrix of these disputes will show that this outcome should not be ruled out: future cases might warrant it and expose the doctrinal intricacies that underpin it.

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<sup>50</sup> See Case C-71/02, *Karner*, EU:C:2004:181, para 35.

<sup>51</sup> *Ibid.*, para 43.

<sup>52</sup> Article 51(1) of the Charter.

<sup>53</sup> Other than the Charter, of course.

<sup>54</sup> Of course, the Charter also applies to the acts of EU institution, and has already proved to be an important touchstone of their legality. See, for instance Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland and Seitlinger and others*, ECLI:EU:C:2014:238; Case C-236/09, *Association Belge des Consommateurs Test-Achats and others*, ECLI:EU:C:2011:100; Case C-362/14, *Schrems*, ECLI:EU:C:2015:650.

<sup>55</sup> Case C-617/10, *Åkerberg Fransson*, ECLI:EU:C:2013:105.

<sup>56</sup> Namely, it concluded that the cumulating of criminal and administrative sanctions did not necessarily breach the principle of *ne bis in idem* protected in Article 50 of the Charter.

The first case is *Sky Italia*.<sup>57</sup> Italian law regulates the broadcasting of advertising, setting different limits for free-tv and pay-tv operators. Pay-tv channels are granted a lower quota of advertising broadcast time. The measure was challenged by Sky in domestic courts, for constituting an obstacle to the cross-border provision of services. The Court, asked for a preliminary ruling, confirmed that the Italian measure fell under the scope of application of Art. 56 TFEU, as it could indeed result in a market barrier. Nevertheless, the Court accepted Italy's explanation that the regulation of advertising was necessary to protect consumers against invasive advertising practices. In essence, the measure fell under EU law, but was not precluded by it. Since EU law applied, the Charter applied too, and the issue of these measures' compliance with the Charter was raised. Sky argued that the limitation on advertising was in breach of the Charter's right of freedom of information and freedom of expression: the rules constrained the company's right to freely determine their broadcasting programming. The Court dismissed the claim without even looking into it, referring to the evidentiary shortcomings of Sky's position. It noticed that the file did not contain a sufficient explanation of how the domestic rule on competition could harm media pluralism.<sup>58</sup> The claim, therefore, failed on the evidence but was plausible on the law. The Court conveniently stopped short of entering the review on the merits of the autonomous Charter-based claim, even if the basic matrix of the case (certain television broadcasters were subject to discriminatory constraints) might have sufficed for the Court to instruct the domestic judge about the possible breach of Article 11(2) of the Charter.

A more recent example is the case *Commission v. UK*.<sup>59</sup> In infringement proceedings: the Commission argued that the UK breached EU law by making child benefits for EU citizens conditional upon a requirement of lawful residence. More precisely, the Commission argued that the UK was in breach of Regulation 883/2004,<sup>60</sup> since the concept of "habitual residence" therein<sup>61</sup> – an element which States can use to allocate benefits – is a matter of fact and cannot be equated to the right to residence under Directive 2004/38 (where residence can be made conditional to economic activity). The Court conceded to the Commission that the requirement of lawful residence is indirectly discriminatory. However, it noted that justifications are available, when they pursue a legitimate interest and are proportionate and necessary:

...it is clear from the Court's case-law that the need to protect the finances of the host Member State justifies in principle the possibility of checking whether residence is lawful when a social benefit is granted in particular to persons from other Member States who are not economically active, as such grant could have consequences for the overall level of assistance which may be accorded by that State.<sup>62</sup>

Therefore, the UK measure was non-precluded by EU law. Whereas the Commission's claim did not concern any possible breach of the Charter, UK judges might review the measure upon application, and set it aside each time it entails an unjustified restriction of Charter's rights. For instance, there might be cases where, in fact, the State's failure to pay child benefit might cause a severe harm to the applicant's right to private and family life.<sup>63</sup> In those circumstances, which

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<sup>57</sup> Case C-234/12, *Sky Italia srl v Autorità per le Garanzie nelle Comunicazioni*, EU:C:2013:496.

<sup>58</sup> *Ibid.*, paras 23-24.

<sup>59</sup> Case C-308/14, *Commission / United Kingdom*, EU:C:2016:436.

<sup>60</sup> Regulation (EC) No 883/2004 of 29 April 2004 on the coordination of social security systems.

<sup>61</sup> Article 1, let j).

<sup>62</sup> Case C-308/14, *Commission / United Kingdom*, EU:C:2016:436, para 80.

<sup>63</sup> See Article 7 of the Charter.

are difficult to anticipate but can arise in the practice, the Charter will cause the disapplication of otherwise EU-compliant measures.

Neither case discussed above resulted eventually in a national measure being struck down for breach of the Charter (despite compliance with EU law at large). This scenario had not arisen until recently. These cases are helpful because only for circumstantial reasons (Sky's under-substantiated claim under the Charter; the Commission's lack of interest in Charter-based review) did the Charter not matter to the outcome. With slightly changed circumstances, cases can arise when non-precluded measures are declared incompatible with the Charter, showing the added value of the latter source in a way that has so far been dormant.

Such scenario has finally arisen in the *Tele2 Sverige* case: national measures falling under the scope of EU law (Directive 2002/58) were found to breach the Charter's rights. However, the case is, at a close look, a hybrid case where the review of national legislation effectively was pre-determined by the review of EU secondary law. Indeed, the case arose after the annulment of the Data Retention Directive for breach of the Charter, and regarded the surviving domestic implementing measures. The determination of Charter-incompatibility was just the logical prosecution of the DRI case; the human rights-inconsistency was not owed to the choices of the domestic legislator, but was primarily caused by EU law.<sup>64</sup>

## **E The scope of application of EU law in the common market**

The expansive force of EU law, and of the Charter with it, is evident in the field of the fundamental freedoms. Any measure capable of raising an obstacle to free movement is, subject to EU law. Consider the *Pfleger* case, intimated above: Austrian law sanctioned the use of gambling machine without license. This was considered an obstacle to the freedom of provision of services, the measure hence fell under EU law. Automatically, the Charter's provisions protecting property and business rights applied too.<sup>65</sup>

To be true, cases like this make the added relevance of the Charter hard to discern. The measure falling under Article 56 TFEU, the applicable Charter standards on freedom of business and right to property were essentially redundant (that is, the same test for breach would refer to either Article 56 TFEU or Articles 15 to 17 of the Charter). However, it is worth noting how a putatively internal matter, i.e. the establishment of criminal conduct and the applicable sanctions, was attracted under the umbrella of EU law, even without breaching it.

At this point, it is easy to understand a basic issue: if the difference between non-application and non-preclusion is blurry, it follows by necessity that the difference between application and non-application of EU law is equally blurry. This difficulty can be observed in some recent opinions of the Advocate Generals of the Court.

One case in point is *C*.<sup>66</sup> The preliminary reference questioned the compatibility with EU law of the Finnish regime of additional taxes on retirement pensions. The relevant standard was the prohibition of discrimination on grounds of age. Advocate General Kokott, before turning to

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<sup>64</sup> Formally, the Charter-incompatible elements of the Data Retention Directive did not require MS to breach the Charter upon implementation, see Fontanelli 2016. However, insofar as the Court determined the unlawfulness of the Directive the similar conclusion about the implementing measures could only follow, in particular when the MS did not bother to limit the interferences upon fundamental rights at the domestic level.

<sup>65</sup> See Articles 15-17 of the Charter.

<sup>66</sup> Case C-122/15, *Proceedings brought by C*, EU:C:2016:391.

the application of the non-discrimination principle, examined whether the measure fell under the scope of EU law at all:

62. According to the judgment in *Pfleger*, situations governed by EU law also include those in which national legislation is such as to restrict the fundamental freedoms guaranteed by the Treaty. A Member State can justify such a restriction only if, at the same time, it observes the fundamental rights provided for in the Charter.

63. In the present case, the taxation of the taxpayer's retirement pension might constitute a restriction of a fundamental freedom and thus fall within the scope of the Charter. After all, the pension received by the taxpayer in 2013 derives at least in part from an activity which he previously carried on in a Member State other than the Republic of Finland. To that extent, the fact that that pension is taxed in Finland may constitute a restriction of the taxpayer's freedom of movement as a worker.<sup>67</sup>

These reflections, which incidentally noted that the situation at hand is not purely internal, seemed to point to a finding of application of EU law: the tax might indeed constitute a restriction of a market freedom.

However, the Advocate General Kokott noted that in the *specific* case at issue the Finnish measure did not, in practice, create any restriction to the freedom of movement of workers.<sup>68</sup> She concluded therefore that the measure does not fall under the scope of EU law at all (which is different from saying it is not precluded by it, as the build-up seemed to suggest).<sup>69</sup> This conclusion clearly treats breaches of the fundamental freedom and the application of EU law co-terminous. When there is no breach of the fundamental freedom, EU law does not apply (nor does the Charter). Only when a breach arises, the whole system of EU law *cum* Charter comes into play. This idea is convenient because it simplifies the set of possibilities, apparently ruling out the possibility of non-preclusion: when application and breach go hand in hand, there is no place for application without breach.

The scrapping of the non-preclusion scenario might be, after all, the Columbus' egg in the field of market freedoms. Because in this area the application of EU law depends on the negative effects of domestic measures (rather than the attribution of competences), there is no such thing as a non-precluded measure: if a measure does not breach a fundamental freedom it is virtually irrelevant under the applicable Treaty provisions. The Court, for its part, preferred to ignore altogether the transnational aspect, and limited itself to noting that pensions (and taxes thereon) fall outside the scope of the equality framework Directive 2000/78.<sup>70</sup> As a result, the national measures fell outside the scope of EU law, the Charter did not apply and the discrimination element was not examined.

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<sup>67</sup> *Ibid.*, footnotes omitted.

<sup>68</sup> *Ibid.*, paras. 65-66.

<sup>69</sup> The judgment of the Court did not address the claim under Article 45 TFEU and only found that Directive 2000/78, the framework directive on non-discrimination on the workplace, did not apply to the circumstances of the case.

<sup>70</sup> Case C-122/15, C, ECLI:EU:C:2016:391, para 23-30.

Kokott's simplification, moreover, does not appear to enjoy consensus among her colleagues. Consider the wording of another recent Opinion of Advocate General Wathelet,<sup>71</sup> concerning a citizenship case<sup>72</sup>:

If a Treaty provision *does not preclude* a Member State from refusing a right of residence subject to compliance with certain conditions, *it follows by definition that the situation in question falls within the scope of that provision*. If that were not the case, the Court would have to decline jurisdiction to answer the question referred.<sup>73</sup>

The main proceedings concerned a *Zambrano*-like dispute. A Pakistani woman who had been married to a German citizen and resided with him in the UK wished to remain there after he moved to Pakistan. She had two kids, who were German citizens. The question was whether she had a right to reside in the UK, whether derived from the ex-husband or the children.<sup>74</sup> Wathelet referred to the situation in which a State, after ascertaining that neither the conditions of Directive 2004/38 nor the *Zambrano-Alopa* exception applies, refuses the right to residence to a third country national.

In so doing, the Advocate General essentially considered this double test (making sure the applicant enjoyed no rights either under Directive 2004/38 or the exceptions) as an EU law-based precondition for the refusal. He therefore clearly ascribed such measure to the category of non-precluded measures, which are covered by EU law precisely because they are not prohibited by the Treaties. The reasoning is circular: the ascertainment that EU law does not apply cannot, *per se*, lead to the conclusion that EU law applies to the circumstance.<sup>75</sup> In this case, this approach would attract under EU law all national immigration policies, even those falling outside the scope of EU law. The consequence, of course, would be that the Charter would also apply, *in lieu* of the sole ECHR.<sup>76</sup> The confusion is partly due to the language of Article 21 TFEU on the right to residence, that is granted “subject to the limitations and conditions laid down” in primary and secondary EU law. The language, that perhaps signalled the limits of EU law's application, is formally one of non-preclusion/authorisation.

It can be appreciated how, within a few months, Wathelet and Kokott came to apparently opposite conclusions regarding the possibility that measures that do not breach fundamental freedoms or citizenship rights be nevertheless covered by EU law – and the Charter. Advocate General Spuznar had already expressed his view on whether EU law applies to measures

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<sup>71</sup> Case C-115/15, *NA*, ECLI:EU:C:2016:487.

<sup>72</sup> As explained above, citizenship rights and market freedoms share their negative normative value, and sit uneasily with the non-preclusion category. This is why cases on citizenship and cases on fundamental freedoms, for the purpose of this article, can be studied together.

<sup>73</sup> *Ibid.*, para 122, emphasis added.

<sup>74</sup> Interestingly, the case was almost hypothetical, as she had been granted residence by the UK under the ECHR.

<sup>75</sup> The reasoning is not transparent. In one passage, the Advocate General acknowledges the accessory nature of the Charter, *see* para 126: “[i]t is European citizenship as provided for in Article 20 TFEU that triggers the protection afforded by the fundamental rights (more specifically, in this instance, Article 7 of the Charter), not the other way round”. In another passage, however, he seemed to posit that the question regarding *whether* Article 20 TFEU applies is already one within the ambit of EU law (*see* para 123).

<sup>76</sup> See the reasoning in C-256/11, *Dereci and others*, EU:C:2011:734, para 72: “if the referring court considers, in the light of the circumstances of the disputes in the main proceedings, that the situation of the applicants in the main proceedings is covered by EU law, it must examine whether the refusal of their right of residence undermines the right to respect for private and family life provided for in Article 7 of the Charter. On the other hand, if it takes the view that that situation is not covered by EU law, it must undertake that examination in the light of Article 8(1) of the ECHR.”

engaging with (but not necessarily precluded by) Article 20 TFEU in his Opinion to *Rendón Marín*,<sup>77</sup>

...as citizens of the Union, those children have the right to move and reside freely throughout the territory of the European Union and any restriction of that right *falls within the ambit of EU law*.<sup>78</sup>

It is nevertheless possible to re-characterise Spuznar's dictum and Wathelet's opinion in *NA*, reading them as a mere rephrasing of the *ERT* doctrine<sup>79</sup> (measures that derogate from EU law fall under its scope). It would be possible to reconcile the views of Kokott, Spuznar and Wathelet in this light. Whereas only measures that *actually* restrict fundamental freedoms or citizenship rights fall under the scope of EU law, there will be some restrictive measures which are justified under EU law. These will be allowed measures (not simply non-precluded) and will fall under EU law, whereas all non-restrictive measures will lie outside its scope. This construction would be consistent with Kokott's view (no *actual* restriction means no application of EU law) and with Spuznar and Wathelet's (an *actual* restriction means that EU law applies, but the restriction might be allowed by EU law).

Similar uncertainties affect national measures concerning areas subject to harmonisation at the EU level. The Court has consistently held that Member States' stricter measures adopted pursuant to minimum harmonisation clauses must comply with other provisions of EU law,<sup>80</sup> notably those concerning fundamental rights. Yet, in *Hernandez* the Court took the view that Article 11 of Directive 2008/94, stating that Member States had the option to introduce laws more favourable to employees than those laid down in that directive, did not grant Member States "an option of legislating by virtue of EU law", but merely recognised a "power which the Member States enjoy under national law".<sup>81</sup> Hence, national measures providing additional protection could not "be regarded as implementing EU law within the meaning of Article 51(1) of the Charter" and, accordingly, "be examined in the light of the guarantees of the Charter".<sup>82</sup>

By the same token, in *Safe Interenvios*, the Court took the view that, in providing that the Member States may adopt "stricter provisions" in the field covered by the Money Laundering Directive, Article 5 of that directive did not grant the Member States "a power or obligation to legislate by virtue of EU law", but simply recognised a "power which the Member States enjoy under national law to provide for such stricter provisions outside the framework of the regime

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<sup>77</sup> Opinion in Case C-165/14, *Rendón Marín*, EU:C:2016:75.

<sup>78</sup> *Ibid.*, para 120, emphasis added.

<sup>79</sup> Case C-260/89, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, EU:C:1991:254. On this case, see P Cruz Villalón, "All the guidance', ERT and Wachauf", in M Poiares Maduro & L Azoulai (Eds.), *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Oxford, Hart Publishing, 2010, pp. 162-169.

<sup>80</sup> See, e.g., Case C-389/96, *Aher-Waggon GmbH v Bundesrepublik Deutschland*, EU:C:1998:357, para 16: "it is necessary to consider whether a Member State which, like the Federal Republic of Germany, has introduced stricter noise limits has, in exercising that power, infringed other provisions of Community law, in particular Article 30 of the Treaty"; Case C-6/98, *Arbeitsgemeinschaft Deutscher Rundfunkanstalten (ARD) v PRO Sieben Media AG, supported by SAT 1 Satellitenfernsehen GmbH, Kabel 1, K 1 Fernsehen GmbH*, EU:C:1999:532, para 42: "the attainment of the objective of Directive 89/552 [...] is not affected in any way if Member States impose stricter rules on advertising [...] on condition, however, that those rules are compatible with other relevant provisions of Community law".

<sup>81</sup> Case C-198/13, *Víctor Manuel Julian Hernández and Others v Reino de España (Subdelegación del Gobierno de España en Alicante) and Other*, EU:C:2014:2055, para 44.

<sup>82</sup> *Ibid.*, para 48.

established by the directive”.<sup>83</sup> Yet, the Court added that that power had to be exercised “in compliance with EU law, in particular the fundamental freedoms guaranteed by the Treaties” and noted that, since national stricter provisions could restrict the provision of money transfer management services,<sup>84</sup> they could only be regarded as permissible “if they are compatible with the fundamental rights the observance of which is ensured by the Court” and protected by the Charter.<sup>85</sup> In sum, although the Charter was held inapplicable due to the lack of an implementation link between EU legislation and the relevant national provisions, the latter’s impact on cross-border trade put EU law and fundamental rights back into play.

## **F An unintended harmonisation effect**

Whereas the Charter only applies to domestic measures implementing EU law, it is possible to observe, or at least speculate over, its spill-over onto non-EU matters. In *Fransson*, it was made clear that a measure could find under the scope of EU law objectively, that is, irrespective of whether it was passed with the intention of implementing EU law.<sup>86</sup>

The unintended implementation of EU law, combined with the attraction mechanism described above (EU law attracts under its scope any measure that breaches it), makes it very hard to know *a priori* whether a specific measure will ever engage with EU law, and possibly enter into conflict with the Charter.

A case in point is the dispute *WebmindLicenses*.<sup>87</sup> At stake was the practice of Hungarian authorities, which transmitted information obtained secretly in pending criminal proceedings to the authorities in charge of the parallel tax assessment. In the main proceedings, the case was made that the use of this evidence in the tax proceedings breached the principles on procedural fairness protected under Articles 41, 47 and 48 of the Charter, in particular the right to defence, and the right to privacy in Articles 7 and 8 of the Charter. In ascertaining first the applicability of EU law, the Advocate General Wathelet was very swift: tax assessment proceedings concern, in part, crimes involving VAT. In line with the *Fransson* judgment, domestic measures regulating VAT collection fall under scope of EU law. As a result, the domestic measures and practice at stake in *WebmindLicenses* are likewise covered by EU, and Art. 51 of the Charter is triggered as a consequence. The Court agreed, and introduced the review of the measures at stake against the Charter with a paragraph that encapsulates the subject of this article:

It follows that EU law does not *preclude* the tax authorities from being able in the context of an administrative procedure, in order to establish the existence of an abusive practice concerning VAT, to use evidence obtained in the context of a parallel criminal procedure that has not yet been concluded, *provided that the rights guaranteed by EU law, especially by the Charter, are observed*.<sup>88</sup>

It is fair to assume that the State rules on the collection and use of evidence in criminal and tax proceedings, and on the exchange of information between the respective authorities, were

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<sup>83</sup> Case C-235/14, *Safe Interenvios, SA v Liberbank, SA and Others*, EU:C:2016:154, para 79.

<sup>84</sup> *Ibid.*, para 99.

<sup>85</sup> *Ibid.*, para 109.

<sup>86</sup> The *Fransson* case in this respect is paradigmatic, as it concerns Swedish measures passed before Sweden’s accession to the EU.

<sup>87</sup> Case C-419/14, *WebMindLicenses*, EU:C:2015:832.

<sup>88</sup> *Ibid.*, para 68, emphasis added.



drafted without the intention to implement EU law, nor the awareness that EU law could be engaged unintendedly. Advocate General Wathelet's finding leads to the conclusion that these rules, which were never intended to relate to EU law, must comply with the Charter or might be set aside in specific circumstances, when the domestic courts find that a breach of the Charter occurred. The consequences of this scenario are disruptive: when decisive evidence was obtained illegally or the individual could not challenge it in fair proceedings, the ensuing decision must be held null and void. The same result follows when the domestic courts are unable to perform this check of Charter-compliance:

[domestic courts] must disregard that evidence and annul that decision if, as a result, the latter has no basis. That evidence must also be disregarded if the national court is not empowered to check that it was obtained in the context of the criminal procedure in accordance with EU law or cannot at least satisfy itself, on the basis of a review already carried out by a criminal court in an *inter partes* procedure, that it was obtained in accordance with EU law.<sup>89</sup>

The only wise option available to a rational legislator to avoid these unexpected challenges, it seems, is to ensure already at the drafting stage that all pieces of legislation comply with the Charter, irrespective of any expected link with the implementation of EU law. This concern should also affect the action of executive and police authorities.

In other words, it is to be expected that State authorities, which cannot predict all the factual and legal scenarios that might entail a link between EU law and domestic legislation, comply with the EU Charter as a matter of convenience, rather than obligation. This was for instance the choice of the Swedish legislator, after *Fransson*. Whereas the Court's judgment identified the implementation of EU law only with respect only with the VAT-portion of the domestic tax assessment proceedings, it was much easier to reform the whole system (VAT and non-VAT) to achieve compliance with EU law. Indeed, the Supreme Court applied the principles stated in *Fransson* and found that domestic law breached EU obligations. It also established a new principle whereby individuals who received a tax surcharge and were prosecuted as a result of the same tax offence were entitled to a new trial.<sup>90</sup> Clearly, the reform did encompass both EU-related and non-EU-related tax assessments, and thus resulted in a voluntary (but inevitable) Charter-isation of this field of Swedish law. In other jurisdictions, where the legislator has not carried out such adjustments, non-VAT fiscal assessments fall outside the scope of EU law, and individuals derive no benefit from the *Fransson* precedent, for instance, in the case of combined administrative and criminal sanctions for evasion of income tax.<sup>91</sup>

This instance is not surprising and is possibly a common occurrence. A rational lawmaker might indulge in spontaneous harmonisation, subscribing to the Charter's obligations even when it is not supposed to, for at least two reasons: to anticipate EU-related problem that are difficult to predict in theory and to maintain uniformity in the law, where a change relating only to the EU-related details would cause unnecessary fragmentation.

## G Conclusions

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<sup>89</sup> *Ibid.*, para 98.

<sup>90</sup> On the reception of *Fransson* in Swedish law, see J Nergelius, 'The Nordic States and the European Convention on Human Rights', in R Arnold (Ed.), *The Convergence of the Fundamental Rights Protection in Europe*, Dordrecht, Springer, 2016, pp. 97-98.

<sup>91</sup> See C-497/14, *Stefano Burzio*, ECLI:EU:C:2015:251, para 29-30.

Any inquiry into the scope of application of the Charter to Member States inevitably opens a can of doctrinal worms. The reasons are obvious: in *Fransson* and some following cases, the Court trumpeted the perfect alignment between the Charter's application and the application of EU law. Knowing when the Charter applies to State measures would therefore require knowing when EU law applies to them – a Sisyphean task if there is one, especially in the field of market freedoms and citizenship rights.

As explained above, there is no reliable test to exclude a given domestic situation from the application of the Treaty rules on the fundamental freedoms. The most used indicators, that is, the principle of conferral and the “purely internal situation” test, are imperfect and can yield false negatives. This is a problem in itself, which has so far been studied predominantly thinking of *preclusive* situations. When EU law has a prohibitive force, it should be known in advance to which domestic measures it applies.

Less attention has been paid to the non-preclusion scenario, but more troubles are well under way. The applicability of the Charter in non-preclusion cases creates another scenario of great legal uncertainty. Measures that raise no issue of compliance with (other rules of) EU law might in fact be prohibited under the Charter. A recurring problem is the characterisation of those State measures that deny EU rights (e.g., asylum and residence requests): whereas the State would argue that the refusal stemmed precisely from the non-application of the EU norms conferring those rights, it could as well be said that, since the conditions for such refusal must be reviewed against EU norms, such measures fall under EU law's scope.<sup>92</sup>

The Court gives domestic judges little guidance to make this determination, and for law-makers and State authorities at large it is virtually impossible to anticipate with certainty whether their measures and acts will ever be scrutinised under the Charter.

A possible outcome of this state of affairs is that States behave pragmatically, and “incorporate” the Charter among the touchstones of lawfulness for all their acts. However, this unintended harmonisation potential of the Charter,<sup>93</sup> which derives from the impossibility to determine with precision its scope of application, goes against the spirit of the several safeguards contained in Article 51(2) of the Charter and Article 6(1) TEU (“the Charter does not extend

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<sup>92</sup> See, for instance, the distinction that Advocate General Mengozzi sketches in his Opinion to Case C-638/16 PPU, *X, X v. Belgium*, ECLI:EU:C:2017:93. On the one hand (para 57), in certain cases “the Court held that the situation of the applicants in the main proceedings which were the subject of those cases was not governed by EU law and had no connection with that law”. On the other hand, in the case at stake (para 59), “the applicants in the main proceedings lodged applications for short-stay visas under an EU regulation which harmonises the procedures and conditions for issuing those visas and which is *applicable to them*. Their situation is indeed covered by the Visa Code both *ratione personae* and *ratione materiae*.” The Court disagreed and opted decidedly for non-application. See C-638/16 PPU, *X, X v. Belgium*, ECLI:EU:C:2017:173, para 42-43: “the applicants in the main proceedings submitted applications for visas on humanitarian grounds, based on Article 25 of the Visa Code ... In accordance with Article 1 of the Visa Code, such applications, even if formally submitted on the basis of Article 25 of that code, fall outside the scope of that code, in particular Article 25(1)(a) thereof, the interpretation of which is sought by the referring court in connection with the concept of ‘international obligations’ mentioned in that provision.”

<sup>93</sup> Please note that this “spontaneous harmonisation” effect is not restricted to the Charter, but extends to other areas of EU law. For instance, the prospect of creating reverse discrimination against their nationals induced Member States to amend or repeal their laws as a whole, whereas EU law only required to disapply them *vis-à-vis* nationals of other Member States. A case in point is the Italian legislation on pasta products, which the ECJ only declared inapplicable to producers from other Member States (Case 407/85, *Drei Glocken*, EU:C:1988:401, para 25), but was eventually struck down as a whole by the Italian Constitutional Court in Judgment no. 443 of 1997.

the scope of application of EU law”). States find themselves in a double-bind: if they do not over-comply with the Charter they might face unexpected Charter-based review of their acts. In any event, the trade-off between autonomy and compliance is one that should not be required by reason of conceptual sloppiness: it is the Court’s responsibility to bring clarity in this area of law.

Whereas the really hard cases might lie at the borderline between non-application and non-preclusion, the state of uncertainty reaches further. National courts are confused by the Chinese boxes of the interlocking scopes of application of fundamental rights and EU law. See for instance how a Dutch judge phrased a question for preliminary ruling.<sup>94</sup> The question refers to the compliance with EU law of a concession regarding the tax deduction of studying costs, which might raise issues of discrimination on grounds of age. After asking the Court whether Directive 2000/78 would apply to the domestic measure (i.e., whether EU law applies at all), the judge asked:

*[If the Directive does not apply, must the principle of non-discrimination on the grounds of age, as a general principle of EU law, be applied to a tax concession on the basis of which training expenditure is only deductible under certain circumstances, even when that concession falls outside the material scope of Directive 2000/78/EC and when that arrangement does not implement EU law?]<sup>95</sup>*

The phrasing is striking because the judge lists in the question the exact reasons why the answer is no: if the measure fall outside the scope of the Directive and does not implement EU law otherwise, EU fundamental principles (whether as general principles or as Charter provisions) cannot apply.

One can wonder whether this incredible confusion is the result of the much maligned reasoning of the Court in *Mangold/Küçükdeveci*,<sup>96</sup> but one thing is certain: fundamental rights and the Charter are routinely treated, whether deliberately (see the choice of the Swedish authorities after *Fransson*) or mistakenly (see the preliminary question above) as an EU source of law that applies to Member States without restrictions *ratione materiae*. The combined effect of this trend with the inherently expansive application of the four freedoms will certainly continue to challenge the tolerance of Member States.

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<sup>94</sup> Case C-548/15, *de Lange*.

<sup>95</sup> Emphasis added.

<sup>96</sup> Respectively, Case C-144/04, *Mangold*, EU:C:2005:709; Case C-555/07, *Küçükdeveci*, EU:C:2010:21.